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In the

United States Court of Appeals

For the Seventh Circuit

No. 11924

RAILWAY EXPRESS AGENCY, INC., *Petitioner,*

vs.

RAILROAD RETIREMENT BOARD, *Respondent.*

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, THE ORDER OF RAILROAD TELEGRAPHERS, RAILWAY LABOR EXECUTIVES' ASSOCIATION, *Intervenors.*

Petition for Review of Order of the Railroad Retirement Board.

REPLY BRIEF AND SUPPLEMENTAL APPENDIX THERETO, OF PETITIONER, RAILWAY EXPRESS AGENCY, INCORPORATED.

U.S. C.A. 7
FILED

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REPLY BRIEF OF PETITIONER, RAILWAY EXPRESS AGENCY, INCORPORATED.

The Statutory Definition of Employee.

For convenience we repeat that under the statute an employee is one who "is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service" (B. Br.* 45).

* In making references Express Agency will use the following:

1. For Appendix to Petitioner's Brief "A."
2. Appendix to Respondent's Brief "R. A."
3. Appendix to Petitioner's Reply Brief "Reply A."
4. Board's Brief "B. Br."
5. Intervenors' Brief "Int. Br."

The Board states that "while the statutory test does not differ substantially from the common-law tests stated in many of the cases it is nevertheless in substitution therefor" (B. Br. 46). And the Board further states "it accepts the aid they (the common-law tests) offer in determining the meaning of the statutory test" (B. Br. 49).

Express Agency urges that the Board must accept the aid the common-law tests offer in determining the meaning of the statutory definition. That definition does not call for any expertise of the Board. Its language "but codifies the common-law rule of master and servant." *Nashville C. & St. L. Ry.* v. *Railway Employees' Dept., etc.*, 93 F. 2d 340, 342 (1937). Where, as here, words have a clear meaning in the common law, that meaning should be attributed to them. (See Express Agency's main brief, pages 26 through 32.) *Party Cab Co.* v. *United States*, 172 F. 2d 87, 92 (7th Cir., 1949), cert. denied, 338 U. S. 818.

But in reality the Board declines to interpret the statutory definition in the light of the common-law tests because it declines evidently to accept those tests which bear upon the right to control as outlined by Judge Major in *Williams* v. *United States*, 126 F. 2d 129, 133, cert. denied, 317 U. S. 655. See Express Agency's main brief, page 33. The Board attempts, by its own interpretation, to accomplish that which in 1946 it failed to do through Congressional legislation, that is, to bring under the Acts everyone who performs any work which is integrated into a carrier's transportation service. See Examiner Funk's report, adopted by the Board (A. 628-644, particularly 638). As said by the Supreme Court in *Addison* v. *Holly Hill Co.*, 322 U. S. 607, at 618:

> "Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.' *Kirsch-*

baum Co. v. *Walling*, 316 U. S. 517, 522. To blur the distinctive functions of the legislative and judicial processes is not conducive to responsible legislation."

The Basic Facts Relating to the Common-Law Test of Control Are Undisputed; Their Import Is.

The caption is the first sentence in Express Agency's main brief in the last paragraph on page 25. The Board seems to take issue therewith (B. Br. 27, 31). But let us examine the Board's brief in the light of the facts bearing on the basic test set forth in *Williams* v. *U. S.*, 126 F. 2d 129, 132, cert. denied, 317 U. S. 655. See Express Agency's main brief, pages 33-35. We shall give each fact its test number as set forth at pages 33 and 34 of Express Agency's main brief.

At page 24 of its brief, the Board admits that "non-exclusive commission agents," which term includes merchant agents, (1) have the right to hire and discharge persons doing the work and (2) prescribe the method and determine the manner of payment of the workman.

At page 24 of its brief, the Board admits that (3) "merchant agents often are principally engaged in business or trade, and have investments in their business." The Board also correctly states on page 24 of its brief that some merchant agents are "wage earners, housewives, farmers, etc." The point is, however, that the comparatively few merchant agents who are not merchants or tradesmen may engage in any business they see fit, and do operate the express business as their own business, furnishing the place where the work is done, the telephone, any advertising and soliciting that may be done, and oftentimes employing others to do the work or assist them in doing the work (A. 381, 385-386, 389-391, 393-397, R. A. 117).

The Board at page 60 of its brief urges that the merchant

agent was not in an independent calling insofar as express is concerned and, therefore, the fact that he may have been engaged in another business or businesses had no bearing on the question of control. In support of its position, the Board cites *Pittsburgh Valve Foundry and Construction Company* v. *Gallagher*, 32 F. 2d 436. In that tort action, the defendant was found to be the employer of the individual responsible for the injury caused by the negligent driving of said individual's automobile. The driver was a laborer in the employ of the defendant and had been engaged by the defendant to transport himself and other laborers to and from the place of work in his own automobile. The negligent driver had no other business or occupation.

The merchant agents conduct their express business as a part of their regular business. For example, Merchant Agent Burns departmentalized his business, placing retail feed and express in one department (A. 279). Merchant Agent Jordan also departmentalized his business (A. 305). When Burns' contract with Express Agency was canceled, he and his employees continued to work and not one of them needed or was entitled to unemployment benefits under the Railroad Unemployment Insurance Act. Merchant Agent Horton in addition to his express work was agent for bottled gas in Hancock County, sold bus tickets, operated a gas station and was in the coal business (A. 231, 243-244). It could hardly be said that Mr. Horton was an employee of the bus company for social security purposes, was an employee of the bottled gas company for social security purposes, was a self-employed businessman for social security purposes, and at the same time was an employee of Express Agency for the purpose of the Railroad Security Acts. Logically, Merchant Agent Horton was in business for himself with respect to all of his activities and those whom he hired and paid were his employees rather

an the employees of the bottled gas company, the Express gency or of any person or company other than Merchant gent Horton.

The Board does not deny and halfheartedly admits on ages 22 and 23 that the merchant agent (4) furnishes ome of the tools and materials with which the work is one such as the motor vehicle where pickup and delivery ervice is furnished, business machines and scales (A. 232, 33, 276, 278, 288, 314, 359).

The merchant agent (5) has control of the premises here the work is done (A. 237, 271, 272, 305, 308, 321, 64).

Express Agency urges the importance of this last item ecause if the agreement with the merchant agent is broken, Express Agency loses the place where the express work is done and may find it difficult to locate another where the community and the business do not warrant the construction or rental of its own quarters. It is one of the important factors distinguishing the merchant agent from all other agents because all other agents operate the express office and warehouse room on premises controlled by Express Agency either by ownership or lease in its name or by reason of contract with the railroad, pursuant to which Express Agency engages the services of the joint agent. The Board at page 62 of its brief and the Intervenors at page 7 of theirs urge that there is no difference, insofar as control of premises is concerned, between the merchant agent and the joint agent. Let us compare what the Board and Intervenors' counsel said while acting as Board's examiner and what they say now.

Mr. Schoene as counsel for the Intervenors says at page 7 of his brief:

> "In the first place, this does not differentiate the merchant agent from the joint agent. It is true that

the railroad rather than the joint agent owns the premises where the joint agent works but the agent is in control in his capacity as railroad agent and the availability of the premises for express business is dependent upon the railroad agent being engaged as express agent."

But Mr. Schoene as Examiner for the Board in his first report, adopted by the Board, said (A. 70):

> "That the use of the railroad companies' premises by The Express Agency is obtained by The Express Agency itself by virtue of its own written agreement with the railroad company, to which the joint agent is not a party is shown by the following excerpt from Article IV of the 'Express Operations Agreement' (Exhibit 1) between the Express Agency and the various railroad companies:
>
> > 'Sec. 1. In cases where an employee of the Rail Company acts as agent for the Express Company, *the Rail Company*, to the extent that it reasonably can, *shall allow the Express Company* the use of a portion of the station buildings now existing or which may hereafter be erected, including appurtenances and conveniences such as heat, light, and use of telephone at station without charge to the Express Company, except as otherwise provided in Section 2 of this Article, provided that the Express Company shall pay any additional toll charge made by the Telephone Company.'" (Italics supplied.)

The Board in its brief at page 62 says:

> "Petitioner argues that when the merchant agent quits Petitioner loses the place where the work is done and the instrumentalities furnished by the merchant agent (Pet. Br. 38). This is also true when a joint agent quits; the premises he occupied, and the instrumentalities he furnished, must also be replaced. There is no difference.

ut the Board in adopting Examiner Schoene's second
ort said (A. 164, 165):

"When a vacancy occurs in the position of agent at a point where the railroad agent usually acts also as express agent, the railroad company fills the position of railroad agent in accordance with seniority rules. However, applicants for the position know that express business is usually handled by the agent in this position, and, in estimating the compensation of the position, take into consideration the expectable express commissions as well as the compensation to be received from the railroad. The fact that the position usually involves the handling of express is, in some instances, shown by the agreement between the railroad company and its agents, and in some instances, by the bulletin published by the railroad company advertising the position, which bulletin may or may not indicate the average express commissions at the point involved. The Express Agency does not negotiate directly with the individual applying for the position nor does it participate in determining to whom the position shall be assigned. When the newly appointed individual reports for service, the railroad company checks him in as railroad agent. At the same time, the Express Agency, through its route agent, checks him in as express agent, and, unless his last previous employment included service as express agent, has him sign the 'Application for Employment,' etc., as stated in the Original Report."

Thus Express Agency does not lose the benefit of the
lroad station when a joint agent quits. There merely is
hange in agents brought about by reason of the fact
t the joint agent was primarily employed by the rail-
d and his job is subject to seniority and subject to bid
the basis of the seniority roster.

It is true that Express Agency at one time urged that
ich Mr. Schoene now urges, but the examiner and the
ard ruled against the Express Agency on that point and

e Express Agency has agreed because of that factor and hers that joint agents are employees insofar as this liti- ation is concerned.

The General Rules and Instructions.

The Board relies upon the General Rules and Instruc- ons (Exhibit XXXVII, R. 2906-3016), and urges that xpress Agency's business is such that merchant agents ust comply therewith as employees (B. Br. 54-58). Ex- ess Agency urges that only those of the General Rules d Instructions which are in the nature of specifications the work or of suggestions, such as some safety rules, ply to merchant agents and their employees.

The application for employment from which the Board otes at page 15 of its brief and the General Rules and structions from which the Board quotes at page 19 of its ief do not specify those rules which apply or those which not apply to merchant agents. It is obvious from a ere reading of the rules themselves that all of them could t apply to merchant agents. It is submitted that the cord fully establishes that purely employee rules do not pply to merchant agents. For example, the record shows at merchant agents and their employees and assistants e not furnished with a badge (A. 393). Therefore, Rule 28 could not apply to merchant agents. That rule reads A. 393, 394):

> "Employees who receive and deliver goods elsewhere than at the Company's offices must wear the Company's regulation badge on the front of their caps while on duty. If badge is lost, stolen, or damaged, prompt report must be made to the official who furnished it."

Similarly, the merchant agent furnishes the telephone A. 239, 275, 279, 305, 324, 386). Obviously and as a matter

ord (A. 397), Rule 920 does not apply to the merchant
That rule reads (A. 397):

"The telephone is furnished for the Company's busi-
ess; employees should not be permitted to use it for
ersonal matters except in case of emergency."

ilarly, Rule 798 (A. 327), Rule 828 (A. 393, 394), and
31 (A. 347, 348, 395) do not apply to merchant agents.

his point, it is of interest to note the following testi-
of typical Merchant Agent Jordan who appeared at
aring in response to notice and without solicitation
part of Express Agency (A. 302, 316):

"A. To get this thing clear, we operate Jordan's,
nd anything that is in the interest of Jordan's is
kay, but when it isn't, it doesn't function. We are
ainly Jordan's. We handle express business as a
de line."

pages 16 and 17 of the Board's brief, reference is
to certain safety rules. These apply to employees
ndependent contractors. As against an employee,
er, Express Agency could "fit the punishment to the
" in the event of an infraction. In the case of a
ant agent, Express Agency, as it could with any con-
r, could only cancel the contract if the contractor
d to follow such safety regulations. In canceling the
act, Express Agency would lose the benefit of the
where the work was performed, of the tools furnished
merchant agent, and of the workers furnished by
erchant agent.

ese safety rules are good rules whether they be con-
d directive as against employees or suggestive with
t to independent contractors. Rules 1140 through
(R. 2998) under heading "Avoiding Traffic Acci-
" are also good rules which any motor vehicle driver
do well to follow.

f much greater importance and of considerable, if not
clusive, significance are the following facts: Typical
rchant Agent Jordan carries workmen's compensation
urance on all of his employees. Express Agency makes
contribution toward the premiums on such insurance
has nothing whatever to do therewith (A. 311). Typi-
Merchant Agent Horton has "compensation" on all of
employees and testified that he would pay any claim
injury to any one of his employees whether the work
s on express or otherwise (A. 245). Typical Merchant
ent Burns pays extra insurance on the truck he uses to
ndle express because of the fact that express is handled
rein (A. 276, 290, 291). Express Agency makes no con-
bution whatever toward the premiums for such insur-
ce (A. 300). The testimony of Merchant Agent Burns
s not solicited by Express Agency. His direct examina-
n was conducted by counsel for the Clerks (A. 265, 528).

The Interstate Commerce Commission issues regulations
d specifications for the transportation of dangerous ex-
sives and Express Agency and its employees must com-
therewith (A. 387). That does not mean, however, that
press Agency or its employees are employees of the
terstate Commerce Commission. Each state and each
mmunity has laws which are in the nature of safety
gulations applicable to all citizens; but that does not
an that citizens are employees of the state. Our complex
y of life is such that not one of us may escape the ap-
ication of safety rules in almost every phase of our ex-
ence. Agents of Express Agency must comply with rules
the railroad while on railroad premises (B. Br. 8; R. A.
, Exhibit 1, Article XIII), but agents of Express Agency,
her than joint agents, are not employees of the railroad.

At pages 20 and 21 of their brief, the Board refers to
rtain testimony of typical Merchant Agents Schreiber

ırns. With respect to Burns, attention is invited to
9 through 13 of Express Agency's main brief.

respect to Schreiber, attention is invited to his
ony as follows. He had been merchant agent since
A. 320). He was 74 years of age in 1948 and retired
when his son took over the operation of his father's
ore and succeeded him as merchant agent (A. 321,
A. 25).

947 Mr. Schreiber's gross drug business amounted
,000.00 from which his net was between $6,000.00
7,000.00. His express commissions amounted to
39 (A. 354). The approximate value of his entire
ss was $50,000.00 (A. 321). The only payment made
Express Agency for or in connection with the ex-
office is 10% commission paid to Mr. Schreiber (A.
22).

Schreiber owned the building and designated the
therein where the express work was performed. He
hed the employees who performed the work, the
, light, heat, scales, a handtruck, and everything
those furnished by the Express Agency which were
d forms, sealing wax, glue, a metal stamp, and tariffs
20-325, 353, 356-359).

Schreiber's telephone is listed in his name only.
ss Agency does not have a telephone listed in its
in Tell City where Mr. Schreiber has his merchant
y (A. 324).

Schreiber has in his employ three regular clerks,
art-time clerk, and Mr. Schreiber's son. Whereas all
oyees at times work on express, his son does the major
of express work, one employee does quite a bit of it,
girl employee is familiar with express work. How-
for the purposes of the Acts, Mr. Schreiber reports

his son and himself as receiving compensation for ress work (A. 322, 323).

r. Schreiber does not report to or consult Express ncy as to who among his employees may do express k, and he delegates such work as he sees fit wholly in- endent of Express Agency. Mr. Schreiber never con- ed Express Agency when he hired or fired any em- ee who did or might do express work (A. 322, 323, 353).

r. Schreiber cannot remember ever signing an Applica- for Employment blank. None of his employees ever ed such an application (A. 353, 354, 359).

r. Schreiber performs the express work entirely upon premises. Express is brought to and from his express e by a truck. He meets no trains and performs no up and delivery service (A. 324).

r. Schreiber and not Express Agency decides who ng the patrons of his business, including drugs and ress, shall receive prior service (A. 332).

r. Schreiber advertises and solicits express business n his own responsibility and entirely independent of ress Agency (A. 335).

f the express business were taken away from him, Mr. reiber would not rent space on his premises to Express ncy for the conduct of express business (A. 356).

f Mr. Schreiber took any counterfeit money in payment xpress charges, that would be his loss (A. 361).

r. Schreiber accepts checks every day from his patrons ayment of express charges and such checks are received his own responsibility and drawn to his order (A. 323).

e followed Rules 827 and 829 in the General Rules and ructions referring to personal conduct and deportment mployees and polite and courteous treatment of patrons ause they were good rules to follow in his own drug

siness as well as his express business (A. 351, 352.

chreiber or any of his employees does not wear or uniform (A. 324).

31 did not apply to him. That rule reads (A. 395):

Drinking intoxicating liquor, gambling or the use profane or vulgar language while on duty, or excive use of intoxicating liquors while off duty, will ufficient cause for investigation and dismissal."

chreiber could go on a spree for three months and Agency would never know anything about it bes boy would take care of the business; and if his uld go on such a spree with him, the express work ill be taken care of by his employees (A. 347, 348).

id in *Universal Camera Corp.* v. *Labor Board*, 340 4, at 488:

"The substantiality of evidence must take into acnt whatever in the record fairly detracts from its ght."

ger may the courts consider evidence in isolation. ss in amending the National Labor Relations Act ed a mood to the end that there might no longer ions such as *Wilson & Co.* v. *Labor Board*, 126 F. 2d . C. A.—1942), cert. denied, 316 U. S. 699, for which tice Evan Evans so ably apologized after the Sucourt reversed him in *Foote Bros. Gear & Mach.* . *National Labor Relations Board*, 114 F. 2d 611, reversed and remanded 311 U. S. 620. See *Universa Corp.* v. *Labor Board*, 340 U. S. 474, 486.

The Merchant Agents Who Testified Are Typical.

At pages 59-63 and 64 of its brief, the Board urges that the merchant agents who testified are not typical. They were presented by Express Agency as typical.

Superintendent Lace heard the testimony of Merchant Agents Horton, Westfall, Schreiber and Jordan. He testified that on the basis of his 26 years as an express employee he was of the opinion they "are typical of the general pattern" of merchant agents (A. 377, 421).

Mr. Hall, Assistant to an Operating Vice President of Express Agency at Chicago, who began his express career in 1904, testified that he was present when Merchant Agents Schreiber, Jordan and Horton testified and that their merchant agencies "were characteristic generally" of merchant agencies in the entire system of Express Agency, "Mr. Horton's in particular" (A. 487).

Examiner Funk has not once stated in his report that any one of the witness merchant agents was not typical.

The Clerks represent most of the employees of Express Agency. Mr. Morgan, Vice President of the Clerks and Mr. Crawford, General Counsel of the Clerks, conducted the direct examination of Merchant Agent Burns (A. 265-269, R. A. 89). Messrs. Morgan and Crawford said in their brief before the examiner:

> "These merchant agents, whose names appear in the record, are typical of the general pattern of merchant agents who perform work for the Agency as merchant agents" (R. 3294).

The Board's contention that the merchant agent witnesses are not typical seems to be based on only two grounds of relatively minor importance, to wit, (1) that the earnings and investments in their business or businesses were not typical, and (2) that with respect to the relatively few mer-

chant agents who are not merchants or tradesmen, it is common for them to do the express work themselves or with the aid of members of their families and or neighbors. It is not disputed that such family members and neighbors are selected and paid by the merchant agents without any supervision by, and often without the knowledge of, Express Agency (B. Br. 59, 63, 64).

At page 24 of its brief, the Board states Superintendent Lace made a survey of merchant agents in his territory from which he learned the investments of such merchant agents in their business and that five ranged from $1,000.00 to $4,000.00. The Board could have been more helpful if it had given the complete and correct story.

First the Board knew or should have known that the church janitor, Roscoe Wilson, and Wilma Mehle were eliminated as merchant agents by a narrowing of the definition to exclude those who had the express office and warehouse on premises controlled by Express Agency or a railroad (A. 551, 552). Mr. Wilson operates in a railroad building in Chenoa, Illinois, for which the Express Agency pays the rental. Wilma Mehle operates in a building at Sterling, Illinois, for which Express Agency pays the rental (A. 408, 411, 413, 414).

Superintendent Lace had 19 merchant agents in his division. As between the merchant agent and Express Agency, all of them controlled the premises on which was located the express office and warehouse. Fourteen of these 19 were merchants or tradesmen, one was an employee of a bus line, one was connected with a greenhouse, and three were postmasters (A. 406-419). Superintendent Lace was able to ascertain the investments in their business of 8 of the 14 businessmen. They are as follows:

Agent	Business	Investment	Reference
Korff	Grocery	$ 3,000.00	A. 406
McCartney	Dray Line	10,000.00	A. 407
Simpson	Retail hardware, furniture, undertaking establishment	70,000.00	A. 407
Sterrenberg	General Merchandise	8,000.00	A. 408
Davison	Grocery & Notions	2,500.00	A. 411
Farmer	Grocery	4,000.00	A. 412
Prim	Drayage Line	1,000.00	A. 412
Schaffer	Drugstore	10,000.00	A. 413

Among those merchant agents from whom Superintendent Lace was unable to learn their investment was Mr. Westfall, a druggist, who was one of the merchant agents who testified (A. 362-376). His gross express commissions amounted to only $8.00 to $10.00 per month (A. 363). His gross annual income from his drug business was $50,000.00 a year (A. 370).

Superintendent Huff had in his division 39 merchant agents, of whom 31 were storekeepers or businessmen, such as garage owners and operators of dray businesses (Exhibit 6a, R. 804-806, A. 116-125).

As spelled out by the practice followed, only those rules which are in the nature of specifications of the work apply to merchant agents. Compare *Reynolds* v. *Northern Pacific Ry. Co.*, 168 F. 2d 934, 940. As said by the court in this last cited case "the question necessarily must be viewed in the light of *United States* v. *Silk*, 331 U. S. 704, 67 S. Ct. 1463, 91 L. Ed. 1757; *Bartels* v. *Birmingham*, 332 U. S. 126, 67 S. Ct. 1547, 91 L. Ed. 1947, 172 A. L. R. 317, and the other recent expressions of the Supreme Court dealing with the sound determination of enterprise status and employer-employee relationship." See Express Agency's main brief 40-47.

The Findings Proposed by Express Agency.

In its main brief, Express Agency in Point VI sets forth eleven findings which it contends are established by the record. These findings also were suggested in Exception No. 15 of Express Agency's Exceptions to the Recommendation of Examiner Funk (R. 3818).

The Board urges under "Summary of Argument" at page 31 of its brief that "the findings petitioner claims in his brief should have been made are irrelevant, or are inaccurate, or are unnecessary." But the Board fails to indicate in its brief those of such findings which it considers as irrelevant, inaccurate or unnecessary except on page 63 of its brief the Board urges (1) that the fact that merchant agent furnishes the building or quarters where the express business is conducted is of "questionable relevance" and (2) that the fact Merchant Agent Burns has an investment of up to $100,000.00 in his business and an income of up to $30,000.00 is "very misleading."

With respect to the first item it is submitted that Express Agency has shown that the fact the merchant agent controls the premises is quite material to the main issue.

With respect to the second item attention is invited to the fact that typical Merchant Agent Jordan also had an investment of $100,000.00 in his business and had a gross income from all of his business of $3,000.00 per month (A. 303, 305). Also the record shows that Merchant Agent Simpson had an investment in his business of $70,000.00 (A. 407). Of the eight agents concerning whose investments in their business Superintendent Lace was able to discover four or one-half had investments of $8,000.00 up to $70,000.00 (A. 406-413).

Social Reasons Do Not Require Application of the Acts to Merchant Agents and Their Employees.

The Board and the Intervenors attempt to persuade the Court to the view that there are social reasons which should require an interpretation bringing within the Acts evidently all those who perform any service integrated into a carrier's operations. Such, of course, is not the fact. Compare *Reynolds* v. *Northern Pac. Ry. Co.*, 168 F. 2d 934, cert. denied 335 U. S. 828. The merchant agents and their assistants and employees are covered by the Social Security Act. To bring them under the Railroad Security Acts would merely cause confusion. The social conditions which were involved in the Fair Labor Standards Act cases such as *Western Union Tel. Co.* v. *McComb*, 165 F. 2d 65, referred to frequently by the Board, are not present here. In this last cited case, the 6th Circuit referred to the case of *Walling* v. *American Needle Crafts*, 139 F. 2d 60 as a guidepost in the application of the Fair Labor Standards Act and said of the opinion in that case:

> "The opinion pointed out the principle that the act is designed to implement a public social, or economic policy through remedies unknown to and often in derogation of the common law; and that in the status of the case the court was not concerned with the question of whether a master-servant relationship existed under otherwise applicable rules of the common law."

Furthermore, the definitions in the Fair Labor Standards Act are far different from those in the Railroad Acts. The Fair Labor Standards Act provides, Section 203, Title 29 U. S. C.:

> "(d) 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a state, or any labor organization (other than when acting as

an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"(e) 'Employee' includes any individual employed by an employer."

Conclusion.

Merchant agents, their employees and assistants are independent contractors and the Railroad Retirement Board should be directed to refund the contributions Express Agency has made with respect to the express earnings of said agents, their assistants and employees.

Dated: October 14, 1957.

Respectfully submitted,

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612 S. Clinton Street,
Chicago 7, Illinois.

APPENDIX.

EXHIBIT NO. LI.

(Letterhead of Puget Sound Navigation Company, Seattle 4, Washington.)

November 22, 1946
File 9-87

ilway Express Agency
gional Accounting Department
icago, Illinois

Attention: S. P. Victor, Auditor of Disbursements.

ar Sir:

Our letter of October 11, 1946, File 9-87, read as fol-
vs:

"Our file concerning R. R. U'Ren, Social Security Ac-
nt Number 534-09-6940, Agent Port Townsend dates
ck to year 1943, and as yet has not been satisfactorily
ncluded.

For several years our commissions were reduced because
deductions made in error by your company to apply
connection with the Railroad Retirement Act in behalf
Mr. U'Ren. As you have been previously notified Mr.
Ren was and is an employee of Puget Sound Naviga-
n Company and accordingly rely represents his em-
oyer when performing your company's duties. All com-
ssions received therefrom accrue and are turned over
the Puget Sound Navigation Company.

As we are extremely anxious to conclude this old sub-
t, would you please arrange refund of the erroneous
ductions that were made account Railroad Retirement
t."

As we have had no answer from the above letter, we would
preciate early reply as to when refund will be made.

Yours very truly,

H. C. Strassburger
Treasurer

AO:mb

3109 EXHIBIT NO. LII.

Affidavit.

State of Washington, } ss.
County of King. }

Alex M. Peabody being duly sworn on oath deposes and says:

That he is the President and Chief Executive Officer of the Puget Sound Navigation Company, a corporation, and as such has full and complete jurisdiction over all the company employees, and

That R. R. U'Ren is the company's Agent at Port Townsend, Washington and as such is a full time paid company employee on a monthly salary basis, and

That his duties include the complete handling of all business of the Railway Express Agency at Port Townsend, and

That all income derived from the handling of the Express Company business is remitted to the Auditor of the Puget Sound Navigation Company, General Offices, Seattle.

Alex M. Peabody.

Subscribed and sworn to before me this 6th day of July, 1949.

Fred Hambly,
Notary Public for the State of Washington residing at Seattle.

(Seal)

17 (Letterhead of Railway Express Agency,
Chicago 7, Ill.)

November 29, 1954

ner M. Funk, Examiner
ilroad Retirement Board
4 Rush Street
icago 11, Illinois

Re: Jurisdictional Docket No. 2-2A

ar Sir:

In accordance with your authorization granted at my quest made at oral argument before you in the above-titled matter October 6, 1954, I enclose affidavit of Charles Schreiber executed November 12, 1954, for inclusion in record.

As you know, I requested such authorization following ur reference during the course of the argument to the llowing appearing on page 18 of The Express Messen r issue of November-December, 1951:

(Name) C. A. Schreiber (Appointed) Agent (Location) ell City, Ind. (Previous Position) Clerk (Entered Serv-) 1940.

I understand you were of the opinion that this quote om the said Messenger was in conflict with the evidence th respect to Merchant Agent C. D. Schreiber of Tell ty.

You know that this same issue of the Messenger at page displays a picture of C. D. Schreiber with the following adnote:

> "Supt. J. J. West (center) congratulates Agents C. D. Schreiber (left), Tell City, Ind., and B. D. Davis, Owensboro, Ky., as they retire."

18 As will be noted therefrom, the enclosed affidavit of C. A. Schreiber adds to the overwhelming weight the evidence that merchant agents are independent con-actors. I am sure it must dispel any doubt as to whether D. Schreiber was a merchant agent and as to whether

carried on and his son, C. A. Schreiber, now carries the express business at their drugstore as a part of eir own business as independent contractors.

Yours very truly,

Fulmer Long.

L:ef
nc.

—Messrs. Robert Morgan
James L. Crawford
Lester P. Schoene
A. H. Burns
C. C. Harrison

19 RAILROAD RETIREMENT BOARD.

Before Examiner Funk.

ailway Express Agency, Incorporated
risdictional Docket No. 2-2A

ell City
unty of Perry } ss.
ate of Indiana

Charles A. Schreiber being duly sworn deposes and says:

That he is the C. A. Schreiber described on page 18 of "The Express Messenger" issue of November-December 951, as having been appointed agent at Tell City, Indiana, aving held the position of clerk and having entered serve in 1940. That he is the son of C. D. Schreiber whose cture is set forth in the lower right-hand corner of page of the same issue of "The Express Messenger."

That deponent is presently in full charge of the operaon of Schreiber Drug Store at Tell City, Indiana and is full charge of the Agency of Railway Express Agency, corporated, operated in connection with and in the same ilding with the said Schreiber Drug Store, and deponent as been so operating the Schreiber Drug Store and the gency of Railway Express Agency, Incorporated since

1, 1951, deponent's father, C. D. Schreiber, having
d as express agent and operator of said drug store
June 30, 1951.

t deponent's father, C. D. Schreiber, conducted the
ss business as Agent of Railway Express Agency,
porated in his drug store many years prior to July
1, 1951, and as far back as deponent can remember
and extending to and including June 30, 1951, de-
ponent's father, C. D. Schreiber, operated the said
store and deponent is informed that his grandfather
d the Schreiber Drug Store in 1865.

t upon the retirement of his father, C. D. Schreiber,
active business, deponent took over the operation of
ther's drug store and his father's express business,
Railway Express Agency, Incorporated recognizing
hange designated deponent Agent as of July 1, 1951.
t immediately prior to July 1, 1951, deponent under
ther, supervised the express business conducted at
gency in the building occupied by Schreiber Drug
and since July 1, 1951, deponent has supervised the
express business in his own name.

t the relationship between Railway Express Agency,
porated and the Agency conducting express business
building occupied by Schreiber Drug Store is the
as it was during the year 1948 and prior thereto and
ontinued the same to the present time, except for
ences in personnel such as the designation of depo-
s Agent on the retirement of his father.

t since deponent has been designated Agent of Rail-
Express Agency, Incorporated, he has at his sole ex-
added an additional room to his drug store building
e in handling express business.

t since he has been designated Agent for Railway
ss Agency, Incorporated, deponent, at his sole ex-
, has advertised express agency service in newspapers
n the yellow pages in the Tell City Telephone Direc-
and deponent also at his sole expense recently pur-
l and installed at the building in which Schreiber
Store is located a neon sign advertising Railway
ss Agency transportation business, and the sale of
ss money orders and traveler's cheques.

21 That the construction of the said room for express business, the said advertising, and the said installa n of the neon sign, all were done on the decision and dgment of deponent without consultation with or author tion by any representative of Railway Express Agency, corporated.

That the said advertising coupled with deponent's igence in conducting his express business has resulted an increased return to him in the form of express com ssions.

That deponent has caused the name of Railway Express gency, Incorporated to be listed in the telephone direc ry in Tell City at deponent's sole expense.

That deponent, entirely independent of Railway Express gency, Incorporated, controls the employes who perform e physical work in connection with express business at ponent's express agency, and deponent has the exclusive ght to hire and discharge such individuals.

That deponent conducts the express business in his build g in which are located Schreiber Drug Store and the gency for Railway Express Agency as his own business bject only to instructions from Railway Express Agency, corporated as to results.

Chas. A. Schreiber.

Subscribed and sworn to before me this 12th day of ovember, 1954.

Mrs. Betty Jane Bender,
Notary Public.

Seal)